IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
DELTA DIVISION

ELLEN JOHNSTON **PLAINTIFF**

V. **CIV. ACTION NO.: 2:07CV42 WAP-EMB**

ONE AMERICA PRODUCTIONS, INC., EVERYMAN PICTURES, TWENTIETH CENTURY-FOX FILM CORPORATION and JOHN DOES 1 AND 2 **DEFENDANTS**

REBUTTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM

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INTRODUCTION AND SUMMARY

Johnston's Response to Defendants' Motion to Dismiss is a mix of outdated or incorrect legal standards, cases about purloined nude photographs in hardcore men's magazines or the unauthorized inclusion of a person's name on ballots or initiatives, or other statements reflecting a fundamental misunderstanding of the applicable law.

Johnston argues that the Motion to Dismiss should be treated as a Rule 56 motion for summary judgment because Defendants presented "matters outside the pleading." This is simply wrong. The film scene in which she appears is central to the Complaint, and Plaintiff does not question the accuracy of the DVD of the film, the transcript of the church camp episode, or the resource materials cited by Defendants. See Exhibit Nos. 2-4 to Defendants' Motion to Dismiss. The Court's consideration of what the film actually shows and says does not implicate facts outside the allegations found in the Complaint about the film.

Johnston argues that Rule 12(b)(6) motions are "rarely granted." This too is wrong. Rule 12 (b)(6) motions on false light and other privacy claims against media defendants are regularly granted. *See, e.g., Alvarado v. KOB-TV, L.L.C.,* No. 06-2001, 2007 WL 2019752 (10th Cir., July 13, 2007) (television news program); *Mize v. Harvey Shapiro Enterprises, Inc*., 714 F. Supp. 220 (N.D. Miss. 1989) (magazine); *Mitchell v. Random House, Inc.,* 703 F. Supp. 1250 (S.D. Miss. 1988) (book).

Several key statements that Johnston makes about the substantive law of Mississippi are also wrong. For example, Johnston states that a false light claim does not require proof of a false statement about the plaintiff. In fact, every false light case in Mississippi state and federal court expressly says the contrary. Johnston cites cases about consent to publish in circumstances that are not merely distinguishable; they are inapposite. Lack of consent is not an element of

Johnston's privacy claims, and Defendants do not raise consent as a defense in their Motion To Dismiss.[1] Finally, Johnston fails to address the incidental use rule or any other legal principle taken from the cases relied on by Defendants which show that her commercial misappropriation claim also fails since no reasonable person could conclude that Defendants attempted to trade on her image in connection with the film "Borat."

Plaintiff's Opposition to Defendants' Motion to Dismiss reveals the true nature of her complaint: Sacha Baron Cohen portrayed himself as someone he is not, and she believed him. Although the film is fully protected as an expressive work under the First Amendment, she is highly indignant, even repulsed, by its contents, and she wants a jury to punish Defendants for Cohen's alleged "deceit." In order to recover on her false light claim, however, Johnston must allege facts showing that Defendants portrayed *her* as someone *she* is not. This she cannot do; she does not even try. Nowhere does Johnston argue, much less allege, that the film shows her doing anything she did not actually do on the day of filming or for that matter anything that she does not ordinarily do as a regular part of worship. Her appearance in the movie is entirely incidental; she has no cause of action for invasion of privacy or any other alleged tort.

A. THE COURT MAY CONSIDER THE CONTENT OF THE SCENE AND OTHER MATTERS WITHOUT CONVERTING DEFENDANTS' MOTION TO DISMISS INTO ONE FOR SUMMARY JUDGMENT.

Under Rule 12(b)(6), the Court must accept as true the well-pleaded factual allegations of the Complaint, viewing them in the light most favorable to the plaintiff. In analyzing the sufficiency of Johnston's factual allegations, the District Court may consider materials that are specifically mentioned in her Complaint, even if she did not attach those materials. *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (reviewing Agreement and fairness opinion); *Herrmann Holdings Ltd. v. Lucent Techs., Inc.,* 302 F.3d 552, 556 (5th Cir. 2002) (reviewing Agreement and Plan of Merger referred to in complaint and submitted by the defendant with motion to dismiss); *Berry v. Safer*, 293 F. Supp. 2d 694 (S.D. Miss. 2003) (reviewing video and transcript of excerpt from television news magazine program).

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[1] The question of consent raised by Defendants in their Motion relates to claims for disclosure of private facts and intrusion upon seclusion – claims Plaintiff appears to have abandoned. *See* Plaintiff's Opposition at p. 3 (July 3, 2007) ("In particular, the Plaintiff has been portrayed in a highly offensive false light, and the Defendants have misappropriated the Plaintiff's likeness for their own commercial use and benefit without her consent.") Even there, Defendants argue only that Plaintiff knew she was being filmed, a fact she does not dispute.

The Court also may consider facts that are properly the subject of judicial notice or matters of common knowledge without a motion to dismiss being converted into a motion for summary judgment. *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1017-18 (5th Cir. 1996) (SEC filings); *J. M. Blythe Motor Lines Corp. v. Blalock*, 310 F.2d 77, 78 (5th Cir. 1962) (state laws and constitutions); *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005) (information on National Mediation Board website); *Wallace v. Federal Emergency Management Agency*, No. C 99-1471 VRW, 2001 WL 125316, * 2 (N.D. Cal. Jan. 26, 2001) (various publications on FEMA website).

Plaintiff argues that she is entitled to submit various affidavits and other material[2] in opposition to the Motion to Dismiss because Defendants included with their Motion three exhibits: (1) a DVD of the film "BORAT"; (2) a transcript of the only scene in which Plaintiff's image appears; and (3) scholarly works describing common worship practices in Pentecostal church services, which are matters of common knowledge or matters about which this Court may take judicial notice. Notably, Johnston does not argue that the DVD is not authentic. Nor does she claim that the transcript is inaccurate or that the general information contained in the cited

[2] Plaintiff's submissions – three affidavits; an unofficial and incomplete transcription of part of a National Public Radio interview with Cohen; and excerpts from a "how-to" guide for independent filmmakers – are the subject of a separate Motion To Strike (July 24, 2007).

works is not accurate. Thus, the materials that Johnston submits in support of her Opposition are not presented to call into question the authenticity or accuracy of the Defendants' exhibits. Johnston's materials are submitted solely for the purpose of attempting to create a fact issue at a stage of the proceedings when to do so is wholly inappropriate. *See, e.g,. Curry v. Shaw School District,* No. 4:06cv45-P-B, 2007 WL 670962 (N.D. Miss. Feb. 28, 2007) (plaintiff cannot convert motion to dismiss into one for summary judgment). Defendants' Motion To Dismiss is based solely on the sufficiency of the allegations of her Complaint, but Rule 12(b)(6) jurisprudence does not require this Court to be handicapped by the plaintiff's failure to attach the publication that is the basis of a claim. When viewed under the appropriate legal standard, each of Johnston's claims fails as a matter of law.

The crowd scene in which Plaintiff appears in the lower left corner of the screen for approximately three seconds is not only mentioned in Johnston's Complaint, but it is "absolutely central" to her alleged claims. *See Fudge v. Penthouse International, Ltd.*, 840 F.2d 1012, 1015 (lst Cir. 1988) (photograph and article alleged to portray the plaintiffs in false light, which were attached to the defendant's motion to dismiss, were properly considered by the district court). Johnston could not prove her case at a trial without showing the church camp scene. Thus, Defendants may introduce the content of the scene when attacking the sufficiency of Plaintiff's pleading. See 5A C. Wright & A. Miller, *Federal Practice & Procedure* § 1327 (3d ed. 2007).

The scholarly descriptions of the practices of the Pentecostal faith that make up Exhibit 4 to Defendants' Motion To Dismiss show that Johnston's actions as depicted in the church camp episode are not unusual in the context of a Pentecostal church service – a point Plaintiff apparently concedes. These works contain the type of information subject to judicial notice by the Court and that the Court may consider on a Rule 12(b)(6) motion. Nothing about these materials takes the "facts" outside those expressly stated or necessarily incorporated into the Complaint. Defendants have done nothing more than place the allegations of the Complaint in their proper context – the movie itself – and they have not opened the door for Johnston to submit other matters outside her pleading.

B. JOHNSTON'S COMPLAINT FAILS AS A MATTER OF LAW BECAUSE THE MOVIE CONTAINS NO FALSE STATEMENT ABOUT HER AND HER IMAGE IS INCIDENTAL TO THE FILM.

In any event, the questions raised by Defendants' Motion To Dismiss are questions of law for the Court to decide, and Johnston's proffered exhibits shed no meaningful light on those issues. Claims for defamation and invasion of privacy based on a written publication, photograph, film, or video tape are subject to judicial scrutiny at the "early stages" of a legal action. *Mitchell v. Random House, Inc.,* 703 F. Supp. 1250, 1258 (S.D. Miss. 1988), *aff'd,* 865 F.2d 664 (5th Cir. 1989). This is because "[t]he trial court's function is to determine whether the statements bear the meaning ascribed to them by the plaintiff and whether that meaning is [actionable]."[3] *Mitchell v. Random House, Inc.,* 865 F.2d 664, 669 (5th Cir. 1989).

Plaintiff cites Federal Rule Civil Procedure 8, mentions the concept of "notice pleadings", and declares that she has satisfied the requirements of Rule 8 because she "[s]he alleged in her Complaint the general theories of invasion of her privacy," Opp. at p. 2 (July 3, 2007). If there was ever any doubt on the subject, there can be none post-*Twombly:* The *"showing"* now required by Rule 8 is a "substantive threshold not achieved by conclusory allegations." *Osakwe v. Dept. of Homeland Security,* No: G-07-00308, 2007 WL 1886249, *3 &

[3] Plaintiff cites a nearly 50-year-old California decision, *Strickler v. National Broadcasting Co.,* 167 F. Supp. 68 (S.D. Cal. 1958), as authority that whether the portrayal of a person places him in a false light is a question of fact for the jury. This approach is not only expressly rejected by other federal appellate courts, *e.g., Fudge v. Penthouse International, Ltd.*, 840 F.2d 1012, 1015 (lst Cir. 1988); but it is also inconsistent with Fifth Circuit practice. *E.g., Mitchell v. Random House, Inc.,* 865 F.2d 664, 670 (5th Cir. 1989).

n. 2 (S.D. Tex., June 29, 2007) (citing *Bell Atlantic Corp. v. Twombly,* 127 S. Ct. 1955 (2007))[4]; *see Alvarado v. KOB-TV, L.L.C.,* No. 06-2001, 2007 WL 2019752 (10th Cir., July 13, 2007) (same). Merely incanting that Defendants allegedly portray Plaintiff in a false light will not suffice, Plaintiff must plead *facts* that, if true, would allow recovery.

At pages 4 and 5 of her Response, Johnston sets out the "facts" she says show she is entitled to relief. But much of what is recited there is not "fact" - nor is it found in Plaintiff's Complaint. Taking the facts alleged in the Complaint and those necessarily revealed by watching the film, and eliminating legal conclusions and hyperbole, Plaintiff's recitation should read:

- The Plaintiff is portrayed at a church camp meeting, participating in a religious service. During the camp meeting Borat interacts with the minister and appears to speak in tongues.

- The Plaintiff, who was aware of the film crew, was told that the film crew was there for purposes of making a documentary.

- Plaintiff raised her hands and praised God during the meeting after Borat appeared to have a religious conversion.

- Borat is a fictional character performed by the actor Sacha Baron Cohen.

- In the finally edited version of the film *Borat*, the viewing audience knows that the Borat character is a fiction but that others depicted in the film appear to believe Borat and his actions are "real."

These factual allegations establish that Plaintiff has no privacy claim (or any other legal claim) against Defendants.

[4] Johnston denies that *Twombly* "retired" the *Conley* standard and insists that "the standard remains the same." Plaintiff's Opp. at p. 4. Respectfully, no one who reads *Twombly* and makes this statement can be of any real assistance to the Court in its labors. "Retirement" and "retired" are, after all, the *Twombly* Court's own words. *Twombly,* 127 S. Ct. at 1969.

1. The Film Does Not Portray Johnston In A False Light Because It Does Not Make Any False Statement Of and Concerning Johnston.

The interest to be protected by a false light privacy claim is the interest of the plaintiff in not being made to appear before the public "otherwise than as he is." *Prescott v. Bay St. Louis Newspaper, Inc.*, 497 So. 2d 77, 79-80 (Miss. 1986), *quoting* Restatement (Second) of Torts § 652E (1977). The publication need not defame the plaintiff, but it must "attribute[] to him characteristics, conduct or beliefs that are false, and so [he] is placed before the public in a false position." 497 So. 2d at 80. Despite Johnston's unsupported statement in her Opposition to the contrary, see Plaintiff's Opp. at p. 9, "it is essential . . . that the matter published concerning the plaintiff is not true." 497 So. 2d at 79.

Johnston tries mightily to contrive a "false position" in which she is portrayed, but she simply cannot do so. The film portrays Plaintiff exactly as she describes herself in her papers: a “genuinely religious person” who praised God when she believed another person had experienced a religious conversion.

The statements that Johnston alleges are untrue are not about her. They all relate either to the circumstances of the filming or to the genuineness of the character Borat’s own actions as depicted in the movie. Putting to one side that her appearance in this film is entirely incidental, Johnston does not allege - nor does the film suggest - that (a) her actions are not accurately depicted in the film; (b) her true character is not accurately represented; or (c) her actions are inconsistent with her ordinary response as a Pentecostal to what occurs on film.[5]

What Johnston does argue is that she is “falsely portrayed as a willing participant in a mockery of her own religious beliefs.” Plaintiff's Opp. at p. 9. The premise of the film, as

[5] The accurate depiction of her honest reaction to a situation - regardless of whether that situation has been staged - is fully protected under the First Amendment.

described by Plaintiff, belies that position. According to her, Defendants "film[ed] a fraud being perpetrated on the Plaintiff and others." Plaintiff's Opp. at p. 8. While Defendants do not agree with her characterization, anyone viewing the *Borat* movie would understand Johnston genuinely thought that the fictional character Borat was a real person and that his spiritual experience was real. It is because of her beliefs on these counts that no reasonable person would conclude that she was "going along with" those who, in her words, were mocking her beliefs. For the less than three seconds that her image appears, the film accurately depicts Johnston simply being herself in the context of a religious service,[6] and it shows her doing nothing more or less than what she would have done had Borat's "conversion" been "genuine." The film does not "clear[ly] and unmistakeabl[y]" suggest that Johnston knew or believed that Borat's experience was not genuine or that Johnston was in on the joke or that she knew at the time that Borat was "mocking" her religion. *See Prescott*, 497 So. 2d at 81. The only way a viewer could reach that conclusion as to Johnston would be as the result of "innuendo, speculation, or conjecture" which is impermissible under Mississippi law when reviewing her false light privacy claim. *Id.*

Plaintiff devotes an entire section of her Response to "Lack of Consent" - a true red herring thrown out in an attempt to side-track the District Court. Lack of consent is not an element of her claims. Whether Plaintiff "consented" to be in *this particular* movie is irrelevant to her false light and misappropriation claims.

What is relevant to her argument is that Johnston admittedly knew that she was being filmed and the filming was for a movie. Specifically, Johnston alleges that "she was led to believe that Mr. Cohen's camera crew was filming a religious documentary." Complaint ¶ 6

[6] Plaintiff states that she was "led to participate in a religious service under false pretenses." Plaintiff's Opp. at p. 5 . This allegation is not in her Complaint, is inconsistent with both the film and Johnston's other assertions, and is irrelevant to her claims. In any event, clearly Johnston came to the camp meeting specifically to participate in the religious service, and not because "Borat" was there.

(March 20, 2007). But Johnston does not allege she was told that she, or any member of her church, would have any editorial control over this documentary or the right otherwise to direct how this film footage might later be used. Similarly, Johnston does not claim that she was assured the documentary would be a puff piece, flattering to her or to the Pentecostal Church, or for that matter, that it would **not** mock her religion. The bare allegation that it was represented to her that the filming was for a "religious documentary" provides no assurance that Johnston or her colleagues or their religious practices might not later be portrayed in an unflattering light.[7]

The whole notion that the law will distinguish between Johnston's being told that the worshipers were being filmed for a "religious documentary” as opposed to being filmed for "*Borat"* is fundamentally unsound. This becomes clear when we consider her claim is, at bottom, a fraud claim.[8] If presented candidly, any such claim would clearly fail since the bare assertion that a camera crew will be filming a "religious documentary” is subject to too many interpretations to be actionable. As such, it is therefore too vague and too ambiguous to be legally actionable.[9] *See, e.g., Presidio Enterprises, Inc. v. Warner Bros. Distributing Corp.*, 784

[7] Defendants do not concede that the film is unflattering to Plaintiff, to others attending the camp meeting, or to the Pentecostal Church. See Defendants' Memorandum in Support of Motion to Dismiss at p. 13 (June 20, 2007).

[8] See Plaintiff's Opp. at p. 8 (“In this case, however, there is no ‘documentary.’ There is a lie. What the Defendants and Sacha Baron Cohen did in this case was to film a fraud being perpetrated on the Plaintiff and others”); *see* Plaintiff's Opp. at pp. 2. 4, 5, 7. In fact it is plain that "Borat" is a documentary-like film and that films of this genre may have elements of fiction as well as fact. *See* Order Ruling on Special Motion to Strike (Feb. 15, 2007) entered in *John Doe I v. One America Productions, Inc.,* No. SC091723 (Sup. Ct. of California, Los Angeles County) (*Borat* is “part fiction and part documentary . . . .”). As explained in the text, the viewer of "Borat" is well aware of this combination of truthful and fictional elements, and the viewer fully understands that there are people in the film who are unaware of this combination of elements. Indeed, the film does not work if viewers believe that those persons in the film who interact with Borat know that Borat is a fictional character. See Defendants' Rebuttal Memorandum at p. 8, *supra.*

[9] The fact is that calling a film a “documentary” does not, as Johnston seems to suppose, mean that the film is any more, or less, accurate than any other creative work. B.K. Grant & J. Sloniowski,

F.2d 674, 679 (5th Cir. 1986) (as a matter of law, producer's representations that movie would be the "blockbuster for the summer of '78," and "will be the most 'want-to-see' movie of the year" were not actionable; the term "blockbuster" is inherently vague; "A statement of fact is one that (1) admits of being adjudged true or false in a way that (2) admits of empirical verification").

The "consent" cases cited by Plaintiff, both applying Texas law, are not merely distinguishable. They are entirely inapposite and therefore are not controlling.

In *Wood v. Hustler Magazine, Inc.,* , 736 F.2d 1084 (5th Cir. 1984), a nude photograph of plaintiff was stolen from her home and submitted with a forged consent form to Hustler Magazine - all without her knowledge. The photograph was published with nude photographs of other women in a section understood to be reader-submitted material. The photo was identified as being the plaintiff and the caption falsely attributed a lewd fantasy to her. The Fifth Circuit found that the "wanton and debauched sexual fantasies and the intimate photos of nude models were of such a nature that great care was required in verifying a model's consent" to the publication, and the procedures used by Hustler were deficient. *Wood*, 736 F.2d at 1092.

Similarly in *Braun v. Flynt*, 726 F.2d 245 (5th Cir. 1984), the plaintiff's photograph was placed without her knowledge in a "magazine devoted exclusively to sexual exploitation and to disparagement of women." 726 F.2d at 254. Plaintiff had given her employer permission to use her photograph for certain promotional purposes related to her employer's business. The

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Documenting the Documentary: Close Readings of Documentary Film and Video 23 (Wayne State Univ. Press 1998) (a claim that "documentaries" "are capturing reality directly and thus are inherently more truthful than fiction films . . . seems intolerable naïve"). The term "documentary" is broadly defined. "Documentary is one of three basic creative modes in film, the other two being narrative fiction and experimental avant-garde." J.C. Ellis & V.A. Mclane, A New History of Documentary Film 1 (Continuum International Publishing 2006). "'[D]ocumentary' can no more easily be defined than 'love' or 'culture.' . . . The definition of 'documentary' is always relational and comparative. . . . 'Documentary' is what we might call a 'fuzzy concept.' . . . Documentaries adopt no one fixed inventory of techniques . . . display no single set of forms or styles." B. Nichols, *Introduction to Documentary* 20-21 (Indiana University Press 2001).

plaintiff's employer - not the plaintiff herself - provided the negatives of the photographs to a hardcore men's magazine after magazine employees had misrepresented the nature of the publication to her employer.

Unlike here, in *Wood* and *Braun* the plaintiffs had taken steps to ensure that they controlled how their image was used: Wood by keeping the photographs out of view in a drawer in her home, and Braun by limiting in writing the use that her employer could make of her image. Johnston cannot say the same. She knew that filming was going to occur during the service she attended, and allowed herself to be filmed with no control over the ultimate use of that film. Based on the manner and the context in which her image is used in the film and the factual allegations of her Complaint, she has failed as a matter of law to state a false light privacy claim.

Incredibly, Plaintiff asserts that the Borat film is "of and concerning her" even though she is not identified by name and appears on screen for three seconds in the 84-minute film. Plaintiff states that "the entire film is 'clearly directed' at persons such as the Plaintiff." What persons are those – Americans? Southerners? Pentecostals? Conservative Evangelicals? Fundamentalists? Christians? That Plaintiff seeks to recover for the perceived offenses to a group is demonstrated by the statement that the movie "won't work without the portrayal of a genuinely religious person such as Plaintiff . . . ." Plaintiff's Opp. at p. 11. That is quite different from saying that the movie will not work without *this* Plaintiff's part in it. Thus, Even Plaintiff realizes that if she did not appear anywhere in the movie, it would be the same movie. Under these circumstances, Johnston's legal position is more attentuated than that of the plaintiff who was a "minor character" in the book in *Mitchell v. Random House, Inc.,* 865 F.2d 664, 671 (5th Cir. 1989), and far more attenuated than that of the Jefferson County jurors in *Gales v. CBS Broadcasting, Inc.*, 269 F. Supp. 2d 772 (S.D. Miss. 2003). Her claim that the film places her fellow believers in a false light also fails as a matter of law.

2. The Filmmakers' Use of Johnston's Image In The Film Is Protected By The First Amendment And, In Any Event, Is Not A Commercial Appropriation of Her Image.

Plaintiff's arguments in support of her misappropriation claim ignore completely the authority cited in Defendants' Motion, including two fundamental principles. In Mississippi, the tort of misappropriation has been limited to commercial speech, that is, publications that used the plaintiff's image or name in connection with proposing a commercial transaction. And the incidental use of one's image in an expressive work is not actionable. No reasonable person could conclude that the inclusion of Johnston's image in the context that it appears here is an attempt to trade on her image.

That Defendants hoped to profit from the movie does not make it commercial speech. See Restatement (Second) of Torts § 652C, cmt. *d* (1977). Although Johnston characterizes the movie as "commercial hate speech," it is in fact an expressive artistic work. The First Amendment fully protects the use of this footage in an expressive work. See *Matthews v. Wozencraft*, 15 F.3d 432, 439 (5th Cir. 1994) (right of publicity does not preclude others from incorporating a person's name, features or biography in a literary work, motion picture, news or entertainment story; only the use of an individual's identity in advertising infringes on the persona).

In any event, not every use of a person's name or image is actionable as a misappropriation. See Restatement (Second) of Torts § 652C, cmt. *d* (1977). The use of her image is clearly so incidental that no reasonable person could conclude that there has been an appropriation of her image or likeness for the purpose of appropriating some commercial or other value. None of the cases cited by Johnston addresses the *incidental* use of a person's name or image for a commercial purpose or for some other value. Plaintiff's Opp. at pp. 12-13.[10] Thus none supports the proposition that the use of her image in this context is something other than incidental. Notably, Johnston makes no attempt to address, much less distinguish, the numerous cases which show that in instances where a plaintiff's image or name was used in circumstances even more extensively than here, the misappropriation claim will be dismissed as a matter of law based on the incidental use principle. Memorandum in Support of Defendants' Motion To Dismiss at p. 19. The application of Plaintiff's misappropriation claim in this context is therefore unsupported by any Mississippi precedent, and even if the misappropriation tort is extended beyond the context of commercial transactions, the incidental use of her image in this context causes her claim to fail as a matter of law.

[10] Plaintiff relies on cases involving the use of a person's name in a context where the act of ascribing the name had particular value or meaning, such as putting a name on a presidential primary ballot (*Battaglia v. Adams*, 164 So. 2d 195 (Fla. 1964); a signature on a petition (*Schwartz v. Edrington,* 62 So. 660 (La. 1913); or a name on a newspaper advertisement soliciting information (*Hamilton v. Lumbermen's Mutual Casualty Co.*, 82 So. 2d 61 (La. App. 1955)).

CONCLUSION

For the reasons explained above, Defendants respectfully request that their Motion to Dismiss the Complaint be granted and that the Complaint be dismissed with prejudice with costs assessed to Plaintiff.

THIS, the 24th day of July, 2007.

ONE AMERICA PRODUCTIONS, INC.
AND TWENTIETH CENTURY FOX
FILM CORPORATION

s/ John C. Henegan
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CERTIFICATE OF SERVICE

I, John C. Henegan, one of the attorneys for Defendants, do hereby certify that I have this day filed the above and foregoing REBUTTAL MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS THE COMPLAINT FOR FAILURE TO STATE A CLAIM with the Clerk of the Court via the Court's ECF System which served a true copy upon the following via the Court's ECF system:

William O. Luckett, Jr.
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ATTORNEY FOR PLAINTIFF

SO CERTIFIED, this the 24th day of July, 2007.

s/ John C. Henegan
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